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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 618

INTERNATIONAL UNION OF OPERATING ENGINEERS, Local 450, AFL-CIO, *Petitioner*

v.

CONSTRUCTION EMPLOYERS ASSOCIATION OF TEXAS, ET AL., *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Construction Employers' Association of Texas, et al, oppose the Petition on the grounds that the Judgment of the Court of Appeals was correct, involved no novel issues and was consistent with well-settled interpretations of the National Labor Relations Act.

OPINIONS BELOW

The opinion of the District Court (Appendix II of Petition) is reported at 301 F.Supp. 49. The opinion of the Court of Appeals for the Fifth Circuit (Appendix III of Petition) is reported at ____ F.2d ____.

JURISDICTION

The facts relevant to jurisdiction are adequately set forth in the Petition. Respondents do not agree that the Fifth Circuit "has erroneously decided an important question of federal law which has not been, but should be settled by this Court."

QUESTION PRESENTED

Was the Petitioner's picketing, under the findings of the Trial Court and the Fifth Circuit Court of Appeals and the undisputed facts, a violation of Section 8(b)(4)(D), compensable by damages under Section 303 of the National Labor Relations Act?

STATUTORY AND PROCEDURAL RULES INVOLVED

The pertinent provisions of the National Labor Relations Act (the "Act") are adequately set forth in the Petition.

STATEMENT OF THE CASE

Petitioner's statement is not a complete and fair representation of the undisputed facts and findings of the lower Courts. Respondents' statement will be limited to stating more accurately those portions of the facts and findings which are relevant and which are either omitted

from or inadequately described by Petitioner's Statement of the Case.[1]

It would not ordinarily seem appropriate to burden a Brief in Opposition in this Court with an extended discussion of the evidence below. Petitioner's entire argument is based, however, on a factually incorrect premise—namely, the contention that the Millwrights did not "claim" the work in question and there was, therefore, no "jurisdictional dispute." This contention was rejected by both the District Court and Court of Appeals, and Petitioner does not contend that the findings below are factually erroneous. Nevertheless, we are constrained by Petitioner's incorrect premise to review in some detail the nature of the "dispute" and "competing claims" which formed the background of Petitioner's picketing.

Ashley-Hickham originally assigned the operation of the pendant controlled crane to its Millwrights on the basis of the practice in the area. Under that practice, Engineers operated cranes with controls in overhead cabs, but pendant controlled cranes were operated by the craft engaged in the primary work as a "tool of the trade." (App. 30-31, 73, 126, 329)[2] Ashley-Hickham believed

1. We shall refer to the parties and other persons by the proper names and abbreviations thereof used by Petitioner. Following Petitioner's usage, "App." refers to the printed Appendix filed in the Fifth Circuit September 9, 1969. "A.P.I," "A.P.II" and "A.P.III" refer to the Appendixes to the Petition herein. All emphasis in this Brief has been added unless otherwise noted.

2. Petitioner attempted to establish, on cross-examination, that Dow "called the shots" and required use of the pendant controlled crane as a tool of the trade. It was clear, however, and the Trial Court found, that Ashley-Hickham was free to assign the work as it saw fit. (App. 49-51, 328-29) If the picketing had been directed at Dow rather than Ashley-Hickham, the picketing, as well as Petitioner's threats to Dow representatives (App. 32-33, 57-58), would have clearly violated § 8(b)(4)(B).

that Millwrights Local 2232 considered this practice to be binding and that the Millwrights might have picketed if Ashley-Hickham had acceded to Petitioner's demand that operation of the crane be assigned to an Engineer. (App. 65-68, 77-81, 86-87) These beliefs had ample basis.

Before work began on the job in question, Engineer Business Agent Koch made numerous demands that Ashley-Hickham assign operation of the crane to an Engineer represented by Petitioner and threatened to picket and to "shut down" Dow and Respondent contractors if such work were not assigned to Engineers.[3] Some of these demands were made directly to the president of Ashley-Hickham; others were made to representatives of Dow and General Electric. (See, e.g., App. 29-35, 57-58, 99-100, 127) In one such conversation with a Dow representative, Koch said in substance that the Millwrights claimed the operation of the pendant controls of the crane as a tool of their trade, that the Operating Engineers did not recognize that claim and that the Millwrights had nothing "in black and white" to substantiate their claim. (App. 33, 43-44)

---

3. In view of the finding by the District Court that one of the objects of the picketing "was to have the Millwrights that were operating the crane . . . replaced by an operating engineer," it is not necessary to discuss Petitioner's unconvincing and irrelevant argument that it was seeking a contract which would give its members the work. The weight of the conflicting testimony is that no request for a contract was made. Nevertheless, the purpose of the picketing was unlawful even if a contract was desired. See, e.g.; *N.L.R.B. v. Denver Building & Construction Trades Council, et al.*, 341 U.S. 675 (1951); *Ernest Renda Contracting Co.*, 123 N.L.R.B. 1776 (1959); *Teamsters Local 525 (E. A. Weinel)*, 127 N.L.R.B. 1377 (1960); *Longshoremen's Union (General Org., Inc.)*, 124 N.L.R.B. 626 (1959); and *Anning-Johnson Co.*, 113 N.L.R.B. 1237 (1955).

Koch admitted that before the job in question began the Millwrights told him that they were going to run the crane (App. 112), and that Millwright Business Agent Fountain told him in connection with the work in question "that he'd have to go along with—I don't know who he meant, Ashley-Hickham or Dow, *but he was going to man the job* at that time." (App. 124) Koch further testified that he talked to Fountain around the time he put the picket line up, that he asked why the Millwrights were running the crane, and that Fountain told him in substance that on this job "he was going along with Ashley" and doing the work. (App. 125-26)

Engineer Business Manager McMahon admitted that in the past his union had on some occasions permitted other unions to operate pendant controlled cranes for "short" periods of time, and that he knew Fountain had told Koch that the Millwrights "were not claiming the work, but it had been assigned to them and somebody had to do the work." (App. 160-62)

The testimony of Fountain, a witness for Petitioner, removed any doubt there might have been about the Millwrights having "claimed" the work.

Before the job in question began, Fountain and Ashley discussed and resolved a dispute involving a complaint by the Millwrights against Iron Workers operating the overhead crane. (App. 172-73, 187) Ashley then asked Fountain what would happen if the Engineers kicked up a "fuss" regarding the overhead crane. Fountain's reply was, "What the heck. We'll cross that bridge when we get to it." (App. 172-73) At the trial, in response to leading questions, Fountain engaged in equivocations and

self-serving, after-the-fact explanations in an effort to negate the idea that the Millwrights "claimed" the work. It was evident, however, that Fountain had definitely and affirmatively asserted to the Operating Engineers and others in the trades *that the Millwrights had the right to operate the pendant controlled crane and intended to hold on to the work.*

Consider, for example, this colloquy on direct examination:

> "Q. Did you ever say to Mr. Ashley that the millwrights claim the work and that it belongs to millwrights? And by that, I'm talking about the operation of the overhead crane.
>
> A. Mr. Combs, let me answer that this way: In discussion with Ashley, I would say at different times that we had figured out ways and arguments that *we might could argue that this work was millwrights, yes, sir.*
>
> But, truthfully, I don't think that he believed or that I believed that the work was actually the work of the millwrights.
>
> The Court: Well, you were sure trying to find a way to claim that it was such, weren't you?
>
> The Witness: No, sir, I didn't place any claim on that work.
>
> The Court: Well, you told Mr. Ashley, 'We'll cross that bridge when we get to it,' and you told him that you were looking for a way to claim it for the millwright.
>
> The Witness: No, sir. I said at many times in discussions with Mr. Ashley we had discussed different ways that we might could claim the work.
>
> The Court: Oh, you might claim it?

The Witness: Yes, sir.

The Court: All right. You just want to add the word, 'might'? Put 'might'?

The Witness: I put 'might' in there the first time, sir." (App. 173-74)

When asked whether the Millwrights started "claiming" the work after the picket line went down, Fountain replied:

> "A. Well, Mr. Combs, this claiming the work is like a baseball player playing ball. He may know well that he's out, *but until that umpire says, 'Get out' he doesn't move off that base. He stays there and claims his place on the base.*
> And so work jurisdiction, or being assigned work, certainly is—*our people are taught that they don't get off the work until such time as the union instructs them to or the National Joint Board instructs them to.*" (App. 177)

On cross-examination Fountain interjected a statement that the "AFL-CIO Green Book" gives the work to the Engineers. Upon objection that the statement was not responsive to the question, the following exchange occurred between the Court and witness:

> "The Court: He answered the question. He already said once before that the Green Book gives him that job.
>
> But in spite of the Green Book, you did tell Mr. Ashley that you might claim that work?
>
> The Witness: Yes, sir. *I told Mr. Ashley that I might claim the work, definitely.*

The Court: In spite of the Green Book?

The Witness: *In spite of all the books, yes, sir.*" (App. 183)

Fountain testified that the Millwright knew the Operators would "raise cane" about the Millwrights operating the crane since they had previously done so. Then, with reference to Ashley's inquiry as to what the Millwrights would do if the Operators complained, Fountain testified as follows:

"Q. And when he asked you that, didn't you tell him, 'Well, what the heck; you know it belongs to them, *but we will go ahead and operate it. Let 'em raise hell if they want to. If it's your desire, sir, we will go ahead with it*'?

A. This is true.

Q. That is what you told him?

A. Yes, sir.

Q. And *you never did change that position with* Mr. Ashley, did you?

A. *Still haven't changed that position.*" (App. 184)

Foutain further testified as follows:

"Q. All right. Now, in talking to Mr. Ashley on other occasions about this work of operating the cranes, didn't you tell him that if it will help the job go better, we will perform the work as long as we can hold onto it?

A. I told Mr. Ashley this on many occasions, yes, sir.

Q. All right, sir. As a matter of fact, you have discussed the question of millwrights operating these cranes with representatives of the operating engineers in the past, have you not?

A. I have argued with the operators on their jurisdiction like I would argue with anyone else. It's customary, a business agent going to a job site, if they expect a problem on some work, they may claim two or three items knowing it doesn't belong to them, hoping to trade it back to the other side. It's negotiations, so to speak, hoping to trade them back to them, give them what belongs to them, give them what they've got an argument over. And I can recall, in all probabilities, more than one argument that I had with the operators over who was going to operate pumps and maybe I would say to them, 'If you don't let me operate your pump, well, I'm going to start claiming operating these overhead cranes,' and I can believe this because it happened.
Q. And you have argued not only with Mr. Koch, you have argued also with Mr. Gordon Hite, who is representative for the—
A. Argued with Gordy, argued with Burt Reynold.
Q. They're both representatives of Operating Engineers Local?
A. Yes.
Q. *And you have argued with them in effect that your men ought to be able to do that work, haven't you?*
A. Yes, sir.
Q. *Of operating the cranes?*
A. *Yes, sir.* I've argued that we could do a lot of work." (App. 185-86)

* * *

"A. We've had complaints arguing that the ironworkers—I had one no later than two weeks ago—that the ironworkers were operating overhead cranes.
Q. Complaints from your millwrights?
A. Yes, sir.
Q. Against the ironworkers?
A. Yes, sir.

Q. For operating the overhead cranes?
A. Yes, sir.
Q. But you never had millwrights complain to you because they, the millwrights, had been required to operate these cranes, had you?
A. I've never had a complaint because the people were required to, no, sir.
Q. All right, sir. As a matter of fact, *you have taken the position, in conversations with contractors and with other union representatives, that operating a crane like this is a tool of the trade, haven't you?*
A. *I probably argued this in instances, yes, sir.*
Q. Yes, sir. And as a matter of fact, you believe it, don't you?
A. No, sir.
Q. All right. You just take the position, you don't believe it?
A. I take the position that *this is a gray area that we like to argue over.* Somewhere you've got to have a point to argue with other people for this may be of trade value and you argue about it because you hope to trade it back to them and gain something else from them.
Q. *But there's no doubt that in the past you have told Mr. Koch, for example, of the operating engineers that your union claimed this work?*
A. *This is true.*" (App. 187-88)

* * *

The Trial Court's findings regarding the above testimony were as follows:

> "One of the factual disputes in this case has to do with whether or not the Millwrights were claiming the right to operate the crane. Evidence before the Court shows clearly that the Millwrights complained to Ashley-Hickham when iron workers were allowed to operate the crane.

> Shortly before the commencement of the job in question, Mr. Ashley inquired of Jack O. Fountain, who at that time was the business representative of Millwrights Local 2232, what would happen if the Operating Engineers took action to demand the operation of the crane, *and Fountain informed Ashley that if that time ever came they would find a way to claim the work.*
>
> There is no question that *Fountain had told officials of Operating Engineers that the Millwrights were claiming the right to operate the crane as a tool of their trade.*
>
> Fountain explained the actions of the Millwrights by explaining that they knew that the operation of the crane belonged to the Operating Engineers, but that they many times made such claims so as to get concessions from other unions on other matters.
>
> From all the evidence, *a finding that the Millwrights were claiming the right to operate the crane in question can be made.*" (A. P. II, pp. 37-38)

The District Court also found, however, that there was "no evidence in this case that the Millwrights ever told Ashley-Hickham that *if the Operating Engineers were given the job of operating the crane, they themselves would strike.*" (A.P. II, p. 39) (It is undisputed that the Millwrights never had occasion to make such a threat, since Ashley-Hickham steadfastly refused the Operating Engineers' demands.)

The District Court then stated:

> "I find, therefore, that under the Act, the protection and claim for damages by an employer under § 8(b)(4)(D) can only be resorted to in a *genuine jurisdictional dispute where two sides of employees*

inform the employer that they will strike if the work is given to the other, or the employer is under contract to assign the work to a particular group. In other words, § 8(b)(4)(D) of the Act cannot be read literally. If it could, there is no question but that the Plaintiffs in this case would have a good cause of action and would prevail.

"*No case that has been cited to this Court has made the finding that is being made here,* but it is a finding which is made necessary by the Act and the cases.

* * *

"*If this finding does not withstand appellate review, then it is clear that actions such as the action of Operating Engineers under the facts here will be compensable.*" (A. P. II, pp. 39-40)

On appeal to the Fifth Circuit Petitioner tacitly admitted that the District Court's decision could not be supported on the narrow grounds relied upon by that Court, i.e., the absence of an express strike threat by the Millwrights. Before this Court Petitioner makes the same admission:

". . . The District Court in the instant case held that there was no violation because the Millwrights did not seek to enforce their demand for the work. Even if, as Respondents contend, the District Court fell into error in requiring a threat to strike for a violation to exist, there must certainly be *something** to show conflict between the two unions, for disputes are never monolithic." (Petition, p. 14)

In the Court of Appeals and in its Petition to this Court, Petitioner therefore has contended in substance

* Emphasis in Petition.

that the Millwrights made no "claim" to the work. However, faced with the overwhelming evidence and the lower Court's findings that the Millwrights did indeed claim the work, Petitioner has couched in vague and shifting terms its descriptions of what constitutes a "genuine" jurisdictional dispute, has avoided to a remarkable degree any discussion of the Millwrights' true position regarding its claim to the work, and has *assumed* for the purpose of its argument that there was "a mere acceptance of the work" by the Millwrights (Petition, p. 13) and that there was "simply a dispute between the employer and the Engineers" (Petition, p. 15).

These same assumptions were rejected by the Court of Appeals as contrary to the evidence and to the findings of the District Court. The Court of Appeals also rejected as unsound the argument that the Millwright claim was of such a nature that the Engineers' picketing did not violate § 8(b)(4)(D):

> "The Operating Engineers strenuously contend that the evils which the Act sought to prevent were not present in the instant case and, thus, it should not be applied to them. This is not a case, they argue, where the in-union either claimed or wanted the assigned work. There being no opposition by the Millwrights to the proposed assignment of the work to the Operating Engineers, the real dispute was between the Operating Engineers and Ashley-Hickham. The conclusion to this reasoning is obvious: The strike resulted from an ordinary, everyday, management-labor economic dispute and was not within the scope of section 8(b)(4)(D). *The facts, however, are otherwise.* The trial judge found that the Millwrights claimed the work. This finding is amply supported in the record and is far from being

clearly erroneous. The Millwrights had vigorously complained to Ashley-Hickham when iron workers were allowed to operate the crane on a prior occasion. The Millwrights' business representative testified that the Millwrights claimed the work. Prior to the picketing, he told officials of both the Operating Engineers and Ashley-Hickham that the Millwrights claimed the work. The Millwrights' claim to the assigned work was more than arguably valid. There is undisputed evidence that the area practice and the practice between the parties for seven similar previous jobs was that the Millwrights operated the crane as a tool of the trade.

"The Operating Engineers, however, even conceding that the Millwrights claimed the work, reason that a '*mere*'* claim is not sufficient to bring into force a statute which is on its face applicable. *This is semantic sophistry.* Jurisdictional strikes have been precisely condemned by Congress and "the damage suit provisions which Congress inserted in the law . . . should not be given a narrow interpretation." *Brotherhood of Carpenters v. C. J. Montag & Sons, Inc.*, 335 F.2d 216, 219 (9th Cir. 1964). The point that the Millwrights honored the picket line does not bolster their contention that there was no real inter-union dispute in the eyes of the law.

* * *

"Furthermore, it has long been recognized that a jurisdictional dispute does not necessitate bloody combat between the two unions claiming the same work. In the instant case, the Millwrights did not stand to lose any wages if an Engineer was allowed to operate the crane. Operation of the crane was incidental to the performance of the maintenance work. Counsel for the Operating Engineers agreed

* Emphasis in Opinion.

during oral argument that Ashley-Hick*man*'s compliance with their demands could have resulted in a situation where a Millwright would continue to operate the crane from the ground while the Operating Engineer sat idle in the seat in the cab. In *International Brotherhood of Carpenters v. C. J. Montag & Sons, Inc.*, supra, the Ninth Circuit stated:

> " 'The fact that one union has the jobs and holds on to them in a polite, non-belligerent manner while the other union used the forbidden tactics in an effort to get them, or get some of them, does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present. And the fact that the union which has the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes. 335 F.2d at 221.'
>
> * * *
>
> "The employer in this case assigned the work to the Millwrights on valid non-discriminatory grounds. The Millwrights performed the work and claimed the right to continue performance of the work. The area and party practices were that the Millwrights were entitled to operate the crane. On these facts, section 8(b)(4)(D) made the picketing by the Operating Engineers an unfair labor practice for which damages are recoverable." (A. P. III, pp. 45-48)

ARGUMENT

The issue presented in this case is extremely narrow and does not warrant review by this Court. The first two questions presented in the Petition (page 3) are, quite simply,

contrary to the undisputed facts of the case. The third question stated in the Petition is the only one supported by the facts. And the only issue for possible determination by this Court under that question is whether the Millwrights' assertion of its members' right to perform the work was sufficient to support a finding that the Engineers' picketing violated Section 8(b)(4)(D). That issue is well settled, in favor of the Circuit Court's decision, by the decisions of this Court, other Circuit Courts and the Labor Board.

Petitioner asserts that this Court must determine whether the existence of a "jurisdictional dispute" is a prerequisite to a judgment under Section 303 of the Act for damages caused by picketing to force assignment of work to employees in a particular union rather than those in another labor organization. That question is simply not presented by this case. The lower Court determined that both unions claimed the work and that a "jurisdictional dispute" did exist. The question whether a violation of §8(b)(4)(D) may be found in the absence of *any* "competing claim" by the incumbent union is interesting but entirely academic under the undisputed facts of this case. Because of the District Court's holding concerning the absence of an express strike threat by the Millwrights, Respondents felt it necessary in the Court of Appeals to brief and discuss extensively the application of §8(b)(4)(D) to various jurisdictional strikes which have been considered by the Labor Board and courts. And in that discussion Respondents noted that the terms "claim" and "jurisdictional dispute" are merely generic terms not used in the Act, having no statutory definition and possessed of no inherent legal significance; that the Labor Board and courts have not given §8(b)(4)(D) the narrow and arti-

ficial interpretation asserted by Petitioner; and that violations of §8(b)(4)(D) have been found in many cases in which the incumbent union either (a) expressly disclaimed interest in the work, (b) made no claim or (c) expressed its claim less vigorously than did the Millwrights in the instant case. Respondents' suggestion below that a "claim" by the incumbent union is not an indispensable element of a violation of §8(b)(4)(D) was made in the alternative only, has been rendered moot by the decision of the Court of Appeals, and at this juncture is nothing more than a straw man erected to lend credence to the Petition.

A similar straw man is Petitioner's discussion of Respondents' alleged reliance upon the *CBS* case, *N.L.R.B. v. Radio Engineers Union*, 364 U.S. 573 (1961). (Petition, pp. 18-19.) Any argument based on *CBS* which Respondents made below is irrelevant *per se* to this Petition, and the basis for Respondents' opposition to the Petition will be found in this Brief rather than the Engineers' Petition. Respondents did not and do not rely on *CBS* for the proposition stated in the Petition. Respondents agree (and argued in the Court of Appeals) that *CBS* is of little or no value in the determination of the instant case. The question whether a "genuine" jurisdictional dispute is a prerequisite to a violation of §8(b)(4)(D) was not before the Court in *CBS*. A "dispute" clearly existed in *CBS*, and the sole issue before the Court was whether the Labor Board had abrogated its statutory duty by refusing to resolve the merits of that dispute. The Court's remarks in *CBS* concerning "jurisdictional disputes" were directed toward the scope and purpose of the two-stage administrative procedure before the N.L.R.B. and have little if any bearing on this case.

The thrust of the Petitioner's case from the beginning of this cause through the trial was simply that the Millwrights had not "claimed" the work. This defense was shaky at best, and it collapsed under the weight of the testimony of the Millwrights' Business Representative. Faced with the Millwrights' clear "claim" and their continued willingnes to perform the work, and recognizing that the Trial Court's narrow construction of the Act will not bear close scrutiny, Petitioner now argues that a "jurisdictional dispute" may exist even without a strike by the incumbent union, *but that the incumbent union must do something more than the Millwrights did here.* Not surprisingly, Petitioner does not explain how the Millwrights could have done anything more than they did short of putting up a picket line of their own or saying to Ashley-Hickam — in so many words — "We'll strike if you give in to the Engineers."

Petitioner's contention that no "dispute" existed is based in large part on the *assumption* that the Millwrights would not have picketed, if necessary, to get or retain the work. This assumption is contrary to the actions and assertions of the Millwrights Business Agent. In any event, the question whether the Millwrights would have struck if the work had been reassigned to Engineers is moot, since Ashley-Hickham — with the Millwrights' knowledge and concurrence — steadfastly rejected the Engineers' demands. The applicability of §8(b)(4)(D) is not dependent — under any decision of the N.L.R.B. or courts — upon *speculation* as to whether an incumbent union might or might not strike *if necessary* to enforce its claim.

The Petitioner's asserted application of § 8(b)(4)(D) is in essence and effect the same as that of the District

Court. Either application places form above substance and invites the careful phrasing of jurisdictional claims and other artful dodging.

There is no support in the cases, in the Act or in its legislative history for the strained and narrow construction which Petitioner would give § 8 (b)(4)(D) and § 303.

The legislative history of § 303 makes it clear that Congress felt it necessary to provide an effective remedy for and deterrent against the damages which all too often had been caused by "jurisdictional strikes," and that damage actions under § 303 were deliberately separated from the administrative procedures before the Labor Board. See, e.g., Vol. 2, *Legislative History, Labor Management Relations Act, 1947*, p. 1371. Speaking in May of 1947, Senator Taft referred to § 303 suits as follows:

> "After all, it is only to restore to people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost. *I do not think suits will often be brought, because I believe the possibility of a suit will be a sufficient deterrent* to prevent unions undertaking this kind of racketeering activity." *2 Legislative History, supra,* at 1371.

The restrictive interpretation given these remedial provisions of the Act by Petitioner's argument is obviously at variance with the aims of Congress as well as the decisions of the courts and Labor Board.

Longshoremen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952), was analogous to the present case. Juneau was engaged in the manufacture of lumber. Its employees were represented by the International Woodworkers of America. Juneau decided to ship lumber by the

use of barges and to utilize its own employees to load the barges. Local 16 of the Longshoremen's Union demanded that Juneau employ its members to load the barges. Juneau refused, and the Longshoremen set up a picket line. *The picket line was honored by most of Juneau's employees for some three months.*[4] Juneau's employees did not picket or threaten to picket. Like the Millwrights in this case, they simply claimed and continued to perform the work. A § 8(b)(4)(D) charge was filed by Juneau against the Longshoremen. A § 10(k) hearing was held, and the N.L.R.B. determined that the Longshoremen were not entitled to the work. The Longshoremen continued to picket, however, for one month after the § 10(k) determination issued. Juneau had filed a damage suit under § 303 prior to the § 10(k) determination. The Longshoremen contended that if Juneau was entitled to any damages, they should be limited to the time following the § 10(k) determination. The Supreme Court rejected this contention and upheld the lower Court's award of damages:

> "Section 8(b)(4)(D) and § 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4), to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that *the remedies provided were to be independent of each other.* Certainly

4. Here, the evidence shows that the Millwrights were not aware that the Engineers' picket line was related to operation of the crane when they honored it. In any event, the picket was up for less than two days, and it is undisputed that the day after the picket was removed the Millwrights returned to the job, resumed operation of the crane and have operated it ever since. (App. 62-3, 68-9, 171, 176, 182, 186)

there is nothing in the language of § 303 (a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. For the jurisdictional disputes proscribed by § 303 (a)(4) are rendered unlawful 'for the purposes of this section only,' thus setting apart for private redress, acts which might also be subjected to the administrative process. *The fact that the Board must first attempt to resolve the dispute by means of a § 10(k) determination before it can move under § 10(b) and (c) for a cease and desist order is only a limitation on administrative power,* as is the provision in § 10(k) that upon compliance 'with the decision of the Board or upon such voluntary adjustment of the dispute,' the charge shall be dismissed. *These provisions, limiting and curtailing the administrative power, find no counterpart in the provision for private redress contained in § 303 (a)(4).* Section 303(a)(4) as explained by Senator Taft, its author, 'retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike.'

"*The right to sue in the courts is clear, provided the pressure on the employer falls in the prescribed category which, so far as material here, is forcing or requiring him to assign particular work 'to employees in a particular labor organization' rather than to employees 'in another labor organization'* or in another class.' Here the jurisdictional row was between the outside union and the inside union. *The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by § 303(a)(4); Petitioners, representing one union and employing outside labor, were trying to get the work which another union, employing mill labor, had. That competition for work at the expense*

of employers has been condemned by the Act. Whether that condemnation was wise or unwise is not our concern. It represents national policy which has both administrative and conventional legal sanctions."

Defendant has relied heavily on the District Court decision in *Penello v. Sheet Metal Workers Local 59*, 195 F.Supp. 458 (D.C. Del. 1961), for the proposition that § 8(b)(4)(D) proscribes picketing only "when it is employed as a means of resolving an active dispute between rival groups of employees which have asserted competing claims for particular work."

Penello was not a damage action under § 303 but an injunction action brought by the Labor Board (through Penello, its Regional Director). The underlying dispute bore no resemblance to this case. Du Pont had a large volume of sheet metal work to be done on a forthcoming project. In the past it had accomplished such work in many instances by employing subcontractors who had labor agreements with and used members of Local 59. In other cases Du Pont had hired members of other unions directly through hiring halls. The choice between these alternative methods was always dictated by economics alone, and Du Pont never questioned the "jurisdiction" of Local 59. The dispute which led to the injunction was also purely economic. Du Point negotiated with Local 59 about performance of a large volume of forthcoming sheet metal work—*which had not yet been assigned to anyone*—but the negotiations broke up over the question of travel pay demanded by Local 59. When Du Pont refused to agree to Local 59's terms and indicated an intention not to use its members, Local 59 began picketing. *At no material time was there any other union or group of employees to whom the forthcoming, disputed*

work had been assigned, and the Court noted that all parties were "in agreement that *no other labor organization* . . . [*had*] *made a claim for this work.*" Under the circumstances, the Court found that the union was simply engaged in an economic strike and that there was not "reasonable cause" to believe there was a violation of § 8(b)(4)(D). We believe, *arguendo*, that this conclusion was in error even under the facts of that case; *but whether it was erroneous or not, it is not applicable to the instant case. For here, unlike Penello, another labor organization did claim the work.*

Under circumstances totally different from those present here, the N.L.R.B. has found in various cases cited in the Petition, pp. 21-22, that there was no "dispute" to determine under § 10(k) (e.g., picketing to protest an employer's termination of the bargaining agreement and unilateral reassignment of driving work from one geographical area to another, with *no* claim by the favored union, *Teamsters' Union (Safeway Stores)*, 134 N.L.R.B. 1320 (1961); and picketing to force work reassignment in the absence of *any* claim by the incumbent union, *Lathers Union (Acoustics and Specialties, Inc.)*, 139 N.L.R.B. 598, 599 (1962)). *The Board has rendered no such decision, however, in any case similar to the one at bar*, and in none of the cited cases was there a claim by an incumbent union similar to that of the Millwrights.[5]

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5. The Board and courts continue to find a violation of § 8(b)(4)(D) when a union pickets to obtain work which is being performed by unorganized employees, despite the absence of "claims" in the usual sense or "strike threats" from the unrepresented employees. See, e.g., *Vincent (Marshall Maintenance) v. Pipefitters Local 39*, 288 F.2d 276 (2d Cir. 1961); and *Pipefitters Local 798 (Moon Pipeline)*, 177 N.L.R.B. No. 62, 71 LRRM 1392 (1969). Such holdings recognize the *employer's* right to protection under § 8(b)(4)(D) and place substance above form.

For obvious reasons, the broad dictum in *CBS* and *Penello* has lent itself to ingenious but disingenuous defenses by unions accused of violating § 8(b)(4)(D).

Thus, unions have argued in various cases that particular acts of picketing for work assignments were not unlawful because there was only a dispute between the picketing union and the employer. Such arguments have in some cases been based on the silence of the incumbent union which was already doing the work. In others, where the incumbent union had nothing to lose even if the employer gave in to the demands of the picketing union, the incumbent helpfully came forward and "disclaimed" the work. The Labor Board and courts have rightfully rejected such defenses as mere dodges which would defeat the obvious purpose of § 8(b)(4)(D), have refused to accept the narrow construction of § 8(b)(4)(D) which Petitioner would read into *Penello*, and have uniformly found picketing unlawful under circumstances similar or analogous to this case. See, for example, the following cases:

N.L.R.B. (Sarrow-Suburban Electric) v. IBEW Local 25, 383 F.2d 449 (2d Cir. 1967);

N.L.R.B. (Pocahontas Steamship) v. ILA Local 1291, 368 F.2d 107 (3d Cir. 1966), affirming 152 N.L.R.B. 676, cert. den. 386 U.S. 1033;

Carpenters v. Montag & Sons, 335 F.2d 216 (9th Cir. 1964), cert. den. 379 U.S. 999;

Carpenters Local 978 v. Markwell, 305 F.2d 38 (8th Cir. 1962);

Cueno v. Operating Engineers Local 825, 300 F.2d 832 (3d Cir. 1962);

Vincent (Marshall Maintenance) v. Pipefitters Local 395, 288 F.2d 276 (2d Cir. 1961);

Operating Engineers Local 520 (Biebel Bros., Inc.), 170 N.L.R.B. No. 38, 67 LRRM 1500 (1968);

Cement Masons Local 524 (Tobasco Prestressed Concrete Co.), 163 N.L.R.B. No. 75 (1967);

Millwrights Local 1113 (Brogdex Co.), 157 N.L.R.B. 996 (1966);

Bricklayers Local 2 (Decora, Inc.), 152 N.L.R.B. 278 (1965);

IBEW Local 639 (Bendix Radio Division), 138 N.L.R.B. 689 (1962).

In *Markwell, supra,* 305 F.2d at 47, the Eight Circuit flatly rejected the union's argument that its picketing was lawful because its only dispute was with the employer, commenting:

"Appellants also contend that the facts here do not establish a true 'jurisdictional dispute.' While §158(b)(4)(D) and its counterpart §187(a)(4) are of particular aid in disputes involving two rival unions within an employer organization *it is clear that these sections are also applicable when the dispute might be said to be solely between an employer and a union.* See Longshoremen, etc. v. Juneau Spruce Corp., 342 U.S. 237, 72 S.Ct. 235, 96 L.Ed. 275, 29 LRRM 2249; Vincent v. Steamfitters Local Union 395, etc., 2 Cir., 288 F.2d 276; 47 LRRM 2695; and Note, 64 Harv. L.R. 781, 806 and cases cited, f.n. 192 at p. 806."

In *Pocahontas Steamship, supra,* 368 F.2d 107, the dispute involved the work of opening and closing hatches aboard the employer's ships. The hatches were opened and closed by turning an electrical switch, an operation which took one man approximately one-half hour during the course of loading or unloading a ship. It was the custom of the employer, Pocahontas, to assign such work to its ships' crews, represented by the National Maritime

Union (NMU). In Philadelphia, site of the dispute, it was customary in the industry to assign the work of opening and closing hatches to a crew of six men and a foreman belonging to the International Longshoremen's Association (ILA). Pocahontas refused to hire such a crew and was picketed by the ILA. After Pocahontas filed charges with the N.L.R.B. claiming a violation of § 8(b)(4)(D), the NMU wrote a "disclaimer" letter to the Board *advising it that the NMU made no claim to the work involved.* The Board nevertheless petitioned for and obtained an injunction from the District Court. The Board ultimately held that, *notwithstanding the NMU disclaimer,* the ILA had violated the Act. In so holding, the Board observed that NMU's purported "disclaimer" involved no sacrifice on its part since its members—*like the Millwrights in the case at bar*—would not be laid off, would lose no time and would receive the same compensation *regardless of whether they performed the minor tasks of actuating the hatch covers.*

In affirming the Board's decision, the Third Circuit stated:

> "From a workman's point of view, the valuable part of a right to a particular job is the right to be paid for it. Thus, a jurisdictional dispute between two groups of employees as to which is entitled to certain work is in essence a dispute as to which shall receive compensation for that work. The opportunity sought to perform labor is significant only as a means of obtaining compensation. It follows that *if workmen, who are entitled to a job under the terms of a labor contract, agree to forego the obligation of working but not the concomitant right to payment, they have not disclaimed any significant right.* When,

> as in this case, one group insists that work, for which another group has contracted and is being paid, be assigned it, *the fact that both groups are claiming pay for the same work suffices to create a jurisdictional dispute, and it is irrelevant that either group, or both, may manifest a willingness to take the pay and forego the work.* See International Brotherhood of Carpenters and Joiners of America (AFL-CIO) v. C. J. Montag & Sons, Inc., 9th Cir. 1964, 335 F.2d 216, 221, 56 LRRM 2755. Contrast Penello for and on Behalf of N.L.R.B. v. Local 59, Sheet Metal Workers International Assn., D. Del. 1961, 195 F. Supp. 458, 48 LRRM 2495, where the union to which an employer proposed to assign work had no contractual right to the work and was not claiming work or attendant pay."[6]

This Court denied certiorari, 386 U.S. 1033.

In *Montag & Sons, supra*, 335 F.2d 216, Montag was engaged in the construction of a dam. Carpenters Local 1849 had a collective bargaining contract with Montag covering carpenter work on the project. Soon after work began, a controversy between Montag and the Carpenters arose concerning the rigging of certain forms used in the pouring of concrete. Montag had assigned the work of rigging these particular forms to members of the Ironworkers Union. The Carpenters caused work stoppages on the project several times by refusing to work or handle wooden frames after they had been rigged by the Ironworkers. Montag brought suit in the District Court under § 303 for damages resulting from the work stoppages. The Carpenters took the position that no jurisdictional dispute existed between them and the Ironworkers

6. The Court did not find, as stated in the Petition, p. 25, that the incumbent union's "claim was nonetheless vigorous." As did the Board, the Court found a *disclaimer*, not a claim, by the incumbent.

because it had agreed with the Ironworkers that the Carpenters would handle the wooden forms and the Ironworkers would handle everything else. However, the Ironworkers would not agree to composite crews, thus requiring duplicate crews for those cranes which were handling both wooden and metal forms. Montag refused to put this union agreement into effect.

The Ninth Circuit upheld an award of damages. It rejected the contention that § 8(b)(4)(D) had not been violated because there was no "jurisdictional dispute" between two unions, commenting in part as follows:

> ". . . The appellants urge that the statute must not be read literally, that it was intended to apply only to such jurisdictional disputes as involved an active controversy between two unions, the employer being the helpless victim over whose prostrate business the battle was being fought. The appellants say that in this case there was no active controversy between the Carpenters and the Iron Workers; that the Carpenters were merely making a lawful demand upon Montag, and using lawful economic force to obtain what they demanded.
>
> "Montag and the other appellees reply that the statute may not be read as if it contained a requirement that there be an active dispute between two unions but that, if the statute must be so read, the requirement is fulfilled by the facts of this case. We agree with the appellees' alternative contention that there was in fact an active dispute between two unions, and therefore find it unnecessary to explore their argument for a literal reading of the statute. This case does not resemble at all the case of *Penello v. Sheet Metal Workers Union*, 195 F. Supp. 458 (D.C. Del.), upon the excellent opinion in which the appellants rely heavily.

"We here take note of the Supreme Court's recognition that the draftsmen of the Taft-Hartley Act regarded jurisdictional disputes as a great evil and were bent upon doing all that could be done to cure that evil. . . . This recognition by the Supreme Court that the mood of Congress was that jurisdictional disputes are intolerable is significant, and teaches us that the damage suit provisions which Congress inserted in the law at the same time that it wrote the above cited provisions for an administrative remedy should not be given a narrow interpretation.

* * *

"We now consider whether there was a jurisdictional dispute between the Carpenters and the Iron Workers for the work of rigging the wooden forms. As we have seen, Montag, as early as April, 1957, assigned the work to the Iron Workers. It persisted in that assignment throughout the two year period of performance of the contract. The Iron Workers, therefore, had no occasion to complain or to strike about the assignment. They had the jobs. Their national union and the Carpenters' union both being members of the AFL-CIO federation, it was natural that their national officers should engage in friendly discussion with the national officers of the Carpenters. All responsible union officials are aware that jurisdictional disputes and feather-bedding are in bad repute, and they try to avoid putting friendly allied unions in the position of engaging in these tactics.

* * *

"The foregoing narration of events giving rise to these suits seems to us to portray a typical case easily within the purpose of the Taft-Hartley Act's provisions concerning jurisdictional disputes. *The fact that one union has the jobs and holds on to them in a polite, non-belligerent manner* while the other union uses the forbidden tactics in an effort to get

them or get some of them, *does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present. And the fact that the union which has lost the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes.*

"On this phase of the case our conclusion is that the District Court was right in finding that Carpenters Local 1849 had violated § 303(a)(4), 29 U.S. Code 187(a)(4) and in giving the appellees in case No. 18,875 a judgment for its damages. . . ."

This Court denied certiorari, 379 U.S. 999.

Petitioner has not, and cannot, cite a single case under § 303 that has been dismissed because there were no "competing claims."

In *Juneau Spruce*, there was no strike threat by the incumbent union, whose members honored the picket line—thus no "genuine jurisdictional dispute" in the sense of Petitioner's argument—yet this Court found a violation.

In *Pocahontas* and *Montag*, the Third and Ninth Circuits found liability under § 303 despite the absence of a strike threat or, in *Pocahontas*, even an express claim by the incumbent union.

There is nothing new or novel involved in the Fifth Circuit's decision; it correctly applies established precedent to the facts of this case. It clearly presents no question warranting the granting of certiorari.

Although not articulated in the same manner in each case, the rationale for *Juneau*, *Pocahontas* and *Montag*

seems to be that § 8(b)(4)(D) exists for the protection of employers as well as incumbent unions, that an employer's right to a remedy in a case such as this should not be contingent upon the precise manner in which, or vigor with which, the incumbent union defends the assignment with which it has been favored, and that an employer in the circumstances of this case is caught, as squarely as was *CBS*, "between the devil and deep blue." *Radio Engineers Union*, 364 U.S. at 575.

Here, as in *Juneau*, *Pocahontas* and *Montag*, the employer was faced with the demands of an outside union on the one hand, and, on the other, with the established status of an incumbent union—a union which was secure in the knowledge that it only needed to assert its claim and sit tight in order to keep the work. "That competition for work at the expense of employers has been condemned by the Act." *Juneau Spruce*, 342 U.S. at 245.

CONCLUSION

Jurisdictional strikes have plagued the construction industry for years, despite continuing efforts by management and labor to improve and encourage the use of available peaceful means of settlement. Petitioner's proposed interpretation of § 8(b)(4)(D) and § 303 would seriously weaken the deterrent value of damage actions under the Act and thus dampen the hope that a better solution than the jurisdictional strike can be found for the industry.

For all the reasons discussed above, the Petition should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed to Mr. W. Arthur Combs, Attorney for Petitioner, 1220 Americana Building, Houston, Texas 77002, on this 13th day of October, 1970.

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